STATE OF MICHIGAN

COURT OF APPEALS

POLARIS HOME FUNDING CORPORATION, Plaintiff-Appellee,	UNPUBLISHED December 28, 2010
v	No. 295069 Kent Circuit Court
AMERA MORTGAGE CORPORATION, Defendant-Appellant.	LC No. 08-009667-CK

Before: MURRAY, P.J., and HOEKSTRA and SERVITTO, JJ.

PER CURIAM.

In this breach of contract action, defendant, Amera Mortgage Corporation, appeals as of right the circuit court's orders granting summary disposition and judgment to plaintiff, Polaris Home Funding Corporation. We reverse and remand for further proceedings consistent with this opinion.

I. FACTS AND PROCEEDINGS

This case arises out of a defaulted mortgage loan underwritten by Polaris. At issue is whether Amera, the mortgage broker, is liable under its agreement with Polaris for transmitting a loan application containing material misrepresentations.

Amera conducts business as both a mortgage lender and a mortgage broker. Polaris operates as a residential mortgage lender and seller. Whereas mortgage lenders underwrite and close mortgage applications, mortgage brokers connect lenders with borrowers. It is undisputed that Amera functioned solely as a mortgage broker in this case and conducted no underwriting review or analysis.

On October 17, 2007, Amera received an initial loan application purportedly from Kathleen Bragg. Amera transmitted the relevant application and disclosure documents along with underwriting authorizations to Polaris, which closed on the loan on October 31, 2007. The amount of the loan was $180,500, and Amera was not involved in the closing process. Polaris subsequently sold this loan on the secondary market to Countrywide Home Loans, Inc. When

several years later the loan went into default, Countrywide notified Polaris that its audit revealed that the final loan application failed to disclose Bragg's other mortgage liabilities, and demanded Polaris's repurchase of the loan.[1] Polaris, in turn, demanded Amera's repurchase of the loan in accordance with their "broker agreement," but Amera declined on the grounds that Polaris did all the final underwriting and had apparently failed to re-verify matters that could affect loan approval. Polaris then settled its obligation to Countrywide for $109,055.12, and initiated the instant suit against Amera on September 11, 2008.

The complaint alleged that Amera's transmission of fraudulent mortgage loan documents and its subsequent failure to repurchase the Bragg loan from Polaris constituted breach of contract. For this, Polaris sought indemnification for damages totaling $189,041.69 plus attorney fees. Amera answered in due course, and Polaris filed a motion for summary disposition under MCR 2.116(C)(10). Citing its "broker agreement" with Amera, Polaris contended that there was no genuine issue of material fact that Amera breached the contract where Amera had warranted that the documents and information were valid and genuine and had promised to repurchase the loan and indemnify Polaris from any losses and expenses should Polaris discover evidence of fraud by the borrower.

Amera replied that the contract imposed no duty on Amera because the agreement only applied when Amera sold loans in its capacity as a mortgage lender. Instead, Amera explained, governing this brokerage dispute was the parties' oral agreement or implied contract that Polaris would compensate Amera in accordance with Polaris's standard brokerage rates. Alternatively, Amera argued that Polaris's deficient verification procedures were the direct and proximate cause of Polaris's damages, which, in any event, Polaris failed to establish sufficiently.

The circuit court found that the plain language of the contract rendered Amera's position untenable. Specifically, the court pointed to the contract's title indicating a "broker agreement" and to sections providing that loan applications generated and submitted by Amera were subject to Polaris's underwriting guidelines and review prior to Polaris's actual underwriting of the purchase. Accordingly, the court granted Polaris's motion for summary disposition and entered judgment in favor of Polaris for $124,195.21 plus interest and court costs.

II. ANALYSIS

A. DOES THE CONTRACT APPLY TO MORTGAGE BROKER TRANSACTIONS?

---

[1] Apparently, Mrs. Bragg and her husband provided basic financial information to a third party, who "handle[d]" home purchases and mortgages, in exchange for a portion of the rent paid on the properties purchased. Notably, Mrs. Bragg testified that her purported signatures on the loan documents were forgeries, that she had never attended a closing, and that she had never heard of Amera Mortgage Corporation. It is undisputed that the loan documents at issue included, *inter alia*, misrepresentations about employment, income, marital status, residency and debt.

As it argued below, Amera claims on appeal that the contract imposed no duty on Amera since the agreement only applied when Amera acted as a mortgage lender rather than as a mortgage broker. The Court reviews de novo an appeal from an order granting a motion for summary disposition pursuant to MCR 2.116(C)(10); *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition pursuant to MCR 2.116(C)(10) should be granted when the moving party is entitled to judgment as a matter of law because there is no genuine issue of material fact. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A genuine issue of material fact exists when reasonable minds could differ after drawing reasonable inferences from the record. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing this issue, the Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence and construe them in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). "Questions involving the proper interpretation of a contract or the legal effect of a contractual clause are also reviewed de novo." *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008).

"The fundamental goal of contract interpretation is to determine and enforce the parties' intent by reading the agreement as a whole and applying the plain language used by the parties to reach their agreement." *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 529; 740 NW2d 503 (2007). "If the contractual language is unambiguous, courts must interpret and enforce the contract as written because an unambiguous contract reflects the parties' intent as a matter of law." *Phillips v Homer*, 480 Mich 19, 24; 745 NW2d 754 (2008).

Reading the plain language of the contract as a whole, we hold that whether the contract applies to mortgage broker transactions is unclear, as the contract contains ambiguous language. Indeed, as shown below, there are provisions in the contract that could be interpreted to mean that the contract applies only to loans underwritten and closed by Amera, and then sold by Amera to Polaris, while there are other provisions that can be seen as applying to a straightforward broker deal.

The provisions relied upon by Polaris and the trial court do not necessarily support the conclusion that the contract applies when Amera is a broker for loans underwritten by Polaris, as many of the provisions indicate that it applies only when Polaris is purchasing a closed mortgage loan from Amera. For instance, the third "Whereas" clause states only that Amera *as the seller of mortgage loans* will utilize Polaris underwriting guidelines, not that Polaris will do underwriting for loan applicants brought forward by Amera:

> WHEREAS, Seller [i.e., Amera] is in the business of originating and selling Mortgage Loans and desires to sell and assign Mortgage Loans, servicing released, to Polaris *which are to be underwritten pursuant to Polaris' underwriting guidelines in effect at the time of each sale*. [Emphasis supplied.]

Additionally, although section I A 3 includes language referencing underwriting by Polaris, the section is contained under the general heading "Purchase and Sale of Mortgage Loans", and states only that Polaris will be obligated *to purchase mortgage loans* if certain criteria are met, which:

> 3) Notwithstanding anything in this Agreement to the contrary, *Polaris shall only be obligated to purchase a Mortgage Loan* i.) if a Commitment to purchase the Mortgage loan was issued by Polaris, and ii.) if Seller and the mortgage Loan strictly conform with the terms of the Commitment and this Agreement, and iii.) if the Mortgage Loan is salable to FNMA, FHLMC, or a prudent investor in the recognized secondary market, or if underwritten by Polaris, conforms with all of Polaris' portfolio underwriting requirements: and iv.) if all documents relating to the Mortgage Loan are complete and acceptable to Polaris in its sole and absolute discretion. [Emphasis supplied.]

Again, this language does not state that Amera will be acting as a broker for certain loans to be issued by Polaris. Instead, it merely states under what circumstances Polaris will be obligated to purchase mortgage loans from Amera.

Similarly, the contract's "Submission and Approval" section indicates, "Seller [Amera] is the originator of all loans offered for purchase" which is predicated upon, as was the prior language just discussed, Polaris purchasing loans, not originating them. Thus, certain portions of the contract can be reasonably read to support the conclusion that the parties did not intend for their agreement to include transactions in which Amera offered loan applications that Polaris would underwrite and fund.[2]

However, some of the same and some other provisions in the contract can be reasonably read to apply to the transaction that occurred here, i.e., Amera preparing the loan documents for approval and underwriting by Polaris. For instance, the contract's title is as a "Wholesale Lending Broker Agreement", and the recitals section reveals that when Polaris is *the loan underwriter*, the loans must conform to Polaris's underwriting requirements. On this score, and as noted earlier, the same contract section that Polaris relies upon appears to also support Amera's view of the contract:

> 3) Notwithstanding anything in this Agreement to the contrary, Polaris shall only be obligated to purchase a Mortgage Loan i.) if a Commitment to purchase the Mortgage loan was issued by Polaris, and ii.) if Seller and the Mortgage Loan strictly conform with the terms of the Commitment and this Agreement, and iii.) if the Mortgage Loan is salable to FNMA, FHLMC, or a prudent investor in the recognized secondary market, *or if underwritten by Polaris, conforms with all of Polaris' portfolio underwriting requirements*: and iv.) if all documents relating to the Mortgage Loan are complete and acceptable to Polaris in its sole and absolute discretion. [Emphasis supplied.]

---

[2] Additionally, there is nothing within the contract that describes how Amera would be compensated for acting as a broker, which is an essential element of a contract. In light of this conclusion, what terms governed the broker transaction between Polaris and Amera is a matter left to the parties and/or the trial court.

The aforementioned language clearly references transactions in which Polaris is the loan underwriter, not merely the loan purchaser as Amera claims. Similarly, the contract's "Submission and Approval" section expressly requires Amera, in seeming contradiction to the provision of this same section noted above, to submit to Polaris "the loan applications and related disclosures" for Polaris's "underwriting review." These sections' references to underwriting are significant because Amera does no underwriting (or underwriting review or analysis) when acting solely as a broker. Additionally, under the "Closing and Delivery" section, it clearly states that Polaris will purchase all loans from Amera on the Disbursement Date, and that the "[f]unds shall be sent by Polaris directly to title agency or settlement attorney for disbursement." According to plaintiff's counsel at oral argument before this Court, when the mortgage loan is "purchased" by Polaris, Polaris is essentially paying the funds directly to the title agency or settlement attorney, for distribution of the funds directly to the consumer of the residential loan. Thus, this contract language could lead to the reasonable conclusion that the parties intended their agreement to include transactions in which Amera offered loan applications that Polaris would underwrite and fund. In other words, the contract would apply precisely to the scenario before us.

Yet, as discussed previously, there are other parts of the contract (sometimes in the same section) that strongly suggest that the contract is meant to apply only when Polaris purchases closed mortgage loans. One thing is clear, and that is that the terms of this contract are not precisely drafted, and that as a result the contract terms do not "fairly admit[] of but one interpretation," *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999), and are ambiguous. The provisions that we have outlined clearly lead to two reasonable interpretations, so we must conclude that the contract is ambiguous. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003); *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997). Accordingly, we reverse the trial court's order granting summary disposition, and remand for a trial.[3]

---

[3] Amera claims the contract is inapplicable on two additional grounds. First, Amera argues that as "sole originator of the mortgage loan", it is not liable under the contract since "origination" under federal law means "the underwriting and funding of the loan," see 24 CFR 3500.2(b). Second, Amera cites the testimony of its president that Amera's compensation for the Bragg loan was based – not on the contract – but on the prevailing rates set forth in Polaris's rate sheet. However, both arguments are raised for the first time in a reply brief, and that is not sufficient to present issues for appeal. MCR 7.212(G); *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 252; 673 NW2d 805 (2003). Notwithstanding, concerning federal law, the term "loan originator" (i.e., the term actually used in the contract) means lender *or mortgage broker*. See 24 CFR 3500.2(b). Additionally, we note that the president's testimony is not pertinent to our understanding of this term because we may not "look to extrinsic testimony to determine [the parties'] intent when the words used by them [in the contract] are clear and unambiguous and have a definite meaning." *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 491-492; 579 NW2d 411 (1998). Thus, were these issues appropriately before us, neither would avail Amera's cause.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Defendant may tax costs, having prevailed in full. MCR 7.219(A).

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Deborah A. Servitto